No. 79 S.

Brief of Putnam & Burlingham for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

Filed Mar. 2, 1898.

No. 79

THE FRANKLIN SUGAR REFINING COMPANY

Appellant

vs.

The Steamship SILVIA, RED CROSS LINE

Appellee

BRIEF FOR THE APPELLANT

HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
Advocates

COWEN, WING, PUTNAM & BURLINGHAM
Proctors

INDEX

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

THE FRANKLIN SUGAR REFINING COMPANY, Appellant,
vs.
The steamship SILVIA, RED CROSS LINE, Appellee.
No. 79.

On *certiorari* to the Circuit Court of Appeals for the Second Circuit.

BRIEF FOR APPELLANT.

This suit was brought in the District Court for the Southern District of New York to recover $4,805.66 for damage to a cargo of sugar shipped at Matanzas, Cuba, and delivered in Philadelphia in February, 1894.

The District Judge, the Honorable Addison Brown, dismissed the libel without costs.

Opinion of District Judge, Record, pp. 49, 50.
Decree of District Court, pp. 50–1.

The steamship *Silvia* is a British vessel of 1104 tons net register, built in Newcastle in 1884. She sailed from Matanzas on February 16th, 1894, with a full cargo of sugar, consisting of 13,227 bags, shipped by Hidalgo & Co. of Havana. The bill of lading (Claimant's Exhibit B, p. 46) acknowledges the shipment "in good order and well conditioned," and contains no exception but "the dangers of the seas."

The steamship sailed from Matanzas in the early morning of the 16th. In the afternoon of the same day the engineer reported water coming through into the engine room (p. 9), and, after a search, it was found that the water had come through a port hole or side port on the starboard side of the forward or No. 1 between decks, had run aft through the wooden bulkhead which divides No. 1 from No. 2 between decks (p. 17), and rising above the coamings of the hatch, which are 12 or 15 inches high (p. 17), had gone into No. 2 hold.

No. 1 between decks had no cargo; it contained only a few ropes and stores (p. 21). It had been fitted up for a steerage just before the steamer left London for Matanzas, and an additional port had been put in on each side forward of the two which had been in her since she was constructed (Shotell, p. 37). The hatch of this No. 1 between decks or steerage was battened down on leaving Matanzas, and there was no access to the steerage except by the hatch (p. 21).

It was through one of the newly-constructed ports that the water came in—the forward one on the starboard side. When the officers opened the forward hatch and went in to the steerage they found that the inside shutter or dummy to this port was open and the glass had been broken. "The dummy is an iron casting, which shuts with a hinge on the inside of the glass and protects it from the inside" (p. 7). When it was shut it kept the water out completely, "with the exception of just a slight weep—not to do any damage of any kind" (p. 9; also p. 15).

The District Judge found (1) that the ship was negligent in not closing the dummy, and (2) that she "sailed from Matanzas not in a seaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the ports;" but that (3) "in supplying the usual iron covers the owners 'had used due diligence to make the ship seaworthy,'" and were therefore relieved from liability under the act of February 13th, 1893 and (4) that the omission to close the dummy was a fault or error in the management of the vessel within the terms of the act.

Opinion of District Judge, pp. 49 & 50.

From the decree of the District Court entered December 1st, 1894, the libellant appealed, and on May 28th, 1895, the Circuit Court of Appeals rendered its decision, holding that the case was controlled by the Harter Act, and that "its provisions relieved the steamship from liability," and affirming the decree of the District Court, with costs.

Opinion of U. S. Circuit Court of Appeals, Record, pp. 52–6.

Application was thereupon made by the libellant to this Court for a writ of *certiorari*, which was granted on November 19th, 1895 (Record, p. 57).

POINTS.

I.—THE NEGLIGENCE OF THE SHIP WAS ABUNDANTLY ESTABLISHED.

It would not be necessary to discuss the question of negligence, but for the doubt contained in the opinion of Judge Wallace, who said:

"Whether they" (those in charge of the navigation of the steamship) "were justified in supposing that there could be any reasonable apprehension of risk from a port so small and so high above the water line as this, protected as it was by a glass cover of such thickness, is a question of fact in respect to which different minds might differ. Assuming, however, that they were not and they were negligent in not putting on the iron cover, we think the case is controlled by the act of Congress," etc., etc.

Opinion of Circuit Court of Appeals, p. 54.

The learned District Judge had no doubt as to the negligence. He said, speaking of the port which was broken:

"The port was supplied with a proper iron cover or dummy, which, however, was not closed or made fast at the time of sailing, although the hatches leading downward into that compartment were battened down. This, in my judgment, was negligence on the part of the ship."

Opinion of District Judge, p. 49.

1. The glass was not broken by a sea. This was the captain's first explanation (Clark, p. 18; Barrett, pp. 41–2), and this is the claim made in the protest (p. 47). In his deposition, however, the master admitted that this was not the fact (pp. 9 and 18).

The weather was fine. The captain says they had "the tail end of a strong breeze, a norther" (p. 9), "a moderate gale," "a moderate wind;" but the ship did not slow down for it (p. 15).

See also Nicholson, 1st officer (p. 29).

The log is not produced (see p. 10).

The broken port was 30 feet or more from the stem, and 8 or 9 feet above the water line (p. 14).

"Q. That is the reason why you say that no sea could have broken it? A. Yes.

"Q. Too high up? A. Too high up."

Clark, master, p. 14.

2. The captain's second theory was that the glass was broken by wreckage. Yet he saw none.

"Q. Do you think that some wreckage broke this glass? A. I only say that because I don't think it could have been broken by the sea.

"Q. That is a mere conjecture? A. Yes.

"Q. No wreckage came through the port? A. No.

"Q. Nothing was found in the steerage? A. No.

"Q. Did any of the officers or crew report having seen any wreckage to you? A. Not that I remember.

"Q. Did you have any entry made in the log about wreckage? A. Not that I know of.

"Q. Well, of course, if you had seen any wreckage, you would have slowed down for it. You wouldn't have gone through it at full speed? A. No; certainly not.

"Q. Was it a clear day? A. Perfectly clear."

Clark, p. 16.

See also Nicholson, 1st officer, p. 32.

The case is much stronger than the *Majestic* (166 U. S., 37; reported below 56 Fed. R., 244, and 60 Fed. R., 624), where the ship actually passed through some wreckage.

3. The damage was due to the failure to shut the dummies or iron shutters in the No. 1 between decks when the vessel sailed.

They could have been shut.

"Q. Was there anything the matter with the dummy on the inside of that port light? A. Not that I am aware of.

"Q. Could it have been shut when you left Matanzas just as well as after you discovered it? A. Yes."

Clark, master, p. 14.

If it had been shut there would have been no damage—"only a mere weep * * * there is enough scuppers to carry off a little water of that kind" (Clark, p. 15).

The captain claims that he was very particular to see that the glass ports themselves were carefully closed (Clark, p. 12). He gave orders to the chief officer to have them closed.

"Q. Did you give him any orders about shutting the dummies? A. No; can't say I did distinctly about the dummies."

Clark, p. 13.

His alleged reason for leaving the dummies open was that they "wanted to go down there at any time for stores, oil, lights, and so on" (Clark, p. 14). But the hatch of No. 1 between decks was battened down before they left Matanzas (p. 20), and the chief officer says that there was nothing in the No. 1 between decks that they wanted in the ordinary course of the voyage from Matanzas to Philadelphia (Nicholson, p. 29).

It appears, therefore, that there was no reason for not shutting the dummies.

"Q. Did you know it (the hatch) was battened down when you left Matanzas? A. Certainly I did.

"Q. Did you know at that time the port dummies were not shut in that steerage? A. I couldn't say.

"Q. Do you mean to say that you allowed that hatch to be battened down without seeing that those dummies were closed there? A. Yes."

Clark, p. 21.

"Q. The idea of a port being stove in never entered your head until this case? A. No.

"Q. If it had, I suppose you would have seen that those dummies were closed? A. I should certainly have ordered them to be closed, and have it understood that they were closed.

"Q. You don't go to sea now with hatches battened down and dummies opened in that steerage? A. Because we don't have the steerage closed up there. We have a steward up and down there all the time. We have our ice-house down there.

"Q. To see how things are going on down there? A. Yes."

Clark, p. 22.

4. The negligence of the officers in not closing the dummies was aggravated by the battening down of the hatch, which prevented access to the between decks.

Clark, p. 20.
Nicholson, p. 24.

II.—THE STEAMSHIP SAILED FROM MATANZAS IN AN UNSEAWORTHY CONDITION.

She was unseaworthy in two respects :

(1.) She had an insufficient glass port.

(2.) She went to sea with dummies not closed and hatch battened down so as to prevent access to the between decks.

1. The port was not a "proper port." No better evidence was needed than that it gave way on an ordinary voyage, in ordinary weather, without any strain or stress to cause it.

This is presumptive evidence of unseaworthiness. The port should have been of sufficient strength to withstand the pressure of ordinary seas. There was no stress of weather. Nothing extraordinary occurred. There is no evidence of wreckage. There was nothing inside the between decks that could have broken the glass. In fine weather the glass port was manifestly insufficient.

It is significant that the sidelight stove in was one of two ports cut in London just previous to sailing. The captain did not join the vessel until she arrived out in St. Johns (p. 20). But the carpenter, who had made the voyage from London, says that about a week or two before the steamer sailed the owner fitted up the steerage and cut two new ports, one on each side of No. 1 between decks.

Shotell, carpenter, p. 37.

There is no proof whatever as to how these ports were cut by the iron-masters in the London dry dock ; whether they were done carefully or not ; whether under supervision or not. Nor is there any proof that the owners took any pains to see that they were well done.

2. The *Silvia* was unseaworthy owing to the fact that she sailed from Matanzas with hatches battened down and dummies open.

This is unseaworthiness, or—to use the words of Lord Cairns in Steel *v.* The State Line S. S. Co.—unfitness "to perform the service which she had undertaken with reference to the goods."

The learned District Judge expressly found that the ship was unseaworthy:

"Although the ship sailed from Matanzas not in a seaworthy condition from the fact that the hatches were battened down without the closing of the iron coverings of the ports," etc.

Opinion, p. 49.

The two facts of open dummies and the hatch battened down so that no one could inspect the condition of the between-decks from time to time, and shut the dummies, if necessary, rendered the ship unseaworthy.

The Circuit Court of Appeals did not agree with the District Judge in this, for the reason that it thought "it would have been but the work of a few moments to unbatten the hatch of the compartment," and close the ports with the iron covers. (Record, p. 53).

We submit that the learned District Judge was right and the Circuit Court of Appeals wrong. The trial Judge, whose experience in admiralty cases is exceptional, appreciated, as the Appellate Judges did not, the meaning of battening down the hatches.

No. 1 between decks had no cargo; it contained only a few ropes and stores (p. 21). It had been fitted up for a steerage just before the steamer left London for Matanzas, and an additional port had been put in on each side forward of the two which had been in her since she was constructed (Shotell, p. 37). The hatch of this No. 1 between-decks or steerage was battened down on leaving Matanzas, and there was no access to the steerage other than the hatch (Clark, p. 20, Nicholson, p. 24).

The hatch was battened down for the purpose of preventing access to the between-decks, there being nothing there which was wanted in the ordinary course of the voyage from Matanzas to Philadelphia.

Clark, master, pp. 20 and 21.

Nicholson, the first officer, says on cross-examination:

"Q. Now, these port lights in the forecastle have shutters, have they? A. Yes, sir.

"Q. But you don't close them? A. No, sir.

"Q. Because you want light in the forecastle? A. Yes.

"Q. Now, you did not need any light in the steerage on that vessel, did you? A. We had to have light going down about our stores.

"Q. But you battened the hatches down there? A. Yes.

"Q. Did you superintend that yourself? A. Yes.

"Q. Did you batten it securely? A. Yes.

"Q. Did you have anything in there that you would need in the ordinary course of a voyage from Matanzas to Philadelphia? A. We had just waste in there and ropes. Still there was nothing that we wanted there.

"Q. Any spars? A. No.

"Q. Ropes? A. Ropes and sails and gear.

"Q. Tackle? A. No.

"Q. Blocks? A. No.

"Q. Don't you keep blocks down there? A. No.

"Q. Where do you keep them? A. In the boat-swain's locker.

"Q. You don't think there was any need of light down there with the hatches battened down? There would have been no difficulty, of course, in closing those shutters? A. No difficulty—if it was necessary."

Record, p. 29.

The Circuit Court of Appeals referred to Lord Blackburn's judgment in the case of Steel *v.* State Line (3 App. Cas., 72). Speaking of this case Judge Wallace says:

"Lord Blackburn expressed the opinion that if the port was in a place where it would be in practice left open from time to time, but was capable of being speedily shut if again required, the vessel could not be said to be unfit to encounter the perils of the voyage; that if when bad weather threatened it was not shut that would be negligence of the crew and not unseaworthiness of the ship."

Opinion of Circuit Court of Appeals, pp 53–4.

We submit that the dicta of Lord Blackburn support our contention that the *Silvia* was unseaworthy rather than the finding of the Circuit Court of Appeals that she was not. Lord Blackburn put the case thus:

"If, for example, this port was left unfastened so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done; if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and

so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it - if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic" (p. 90).

Lord Blackburn goes on to say that if the "port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light in such a case," the vessel could not be said to be "unfit to encounter the perils of the voyage."

If the No. 1 between decks of the *Silvia* had been in use as a steerage, as it was subsequently, and if, as the captain puts it, a steward was "going up and down there all the time," there would be no reason why the dummies should not be open; but to batten down the hatch and leave the dummies open was to make the vessel unseaworthy, that is, unfit to encounter the perils of the voyage.

The proofs show beyond question that it was not intended that there should be access to No. 1 between decks during the voyage from Matanzas to Philadelphia; that there was no access; that the very purpose of battening down the hatch was to prevent access. It needs no testimony to show that if rough weather came on it would be a very dangerous thing to attempt to open the hatch.

If the attendance of persons to watch for changes of weather was necessary as a condition of using the ports, provision by the owners for such attendance was essential to make the vessel seaworthy. The owners have no right to cut a dangerous opening in the ship's side, and then say that because they had placed near it an appliance which could be used to make it safe, but which required the attendance of some one especially charged with the duty of using it, they had fulfilled their obligations, unless they have in fact assigned such a person to that special duty. Many steamers have cargo ports in their sides, and lumber vessels have

ports in the bows, which are kept closed by bolts and fastenings which require caulking or rubber packing to make them watertight. Would such a vessel be seaworthy if her owner had provided a bale of oakum and tools to use it, if they had not in fact been used?

3. Since the decision of the Circuit Court of Appeals in this case, the English Court of Appeal has held the vessel unseaworthy upon a state of facts substantially like the present.

Dobell *v.* Rossmore S. S. Co., [1895] 2 Q. B., 408. See Appendix p. 31.

In this case goods were damaged by sea water which came through a port hole closed by the ship's carpenter before the vessel started on her voyage, but in such an imperfect manner that it was not water tight. "The appliances for closing the port hole were sufficient and in good order, and the competency of the ship's carpenter for the duties he had to perform was not disputed." There was no access to the port without removing cargo.

Lord Justice Kay said, among other things:

"It was not denied that she was unseaworthy in fact, and it could not be denied after the decision of the House of Lords in *Steel* v. *State Line Steamship Co.* In that case Lord Blackburn said in effect that if there was a port hole in the ship left unfastened, and the cargo was stowed in such a way that it would take a considerable time to get at the port hole and fasten it, the ship would be unseaworthy; but that if it could be shut directly the necessity arose, the ship could not be said to be unseaworthy; and this view is confirmed by Lord Herschell in the more recent case of *Hedley* v. *Pinkney & Sons Steamship Co.* We have, therefore, the strongest authority for saying that in this particular case the ship was unseaworthy, because it is admitted that this port hole could only be got at during the voyage by shifting the cargo—a matter which would involve a considerable expenditure of time and labor."

The decision of the Circuit Court of Appeals in the present case was referred to in the Rossmore case in the judgment delivered by Lord Esher, as well as in the argument of counsel. It was distinguished, however, by counsel for the plaintiffs, who said:

"The case in the United States Circuit Court of Appeals followed the decision in *Steel* v. *State Line Steamship Co.*, and

it is plain the port could have been got at and closed with the iron cover directly the necessity arose," (p. 412).

As we have shown, this was not the fact.

III.—THE ACT OF FEBRUARY 13, 1893, DOES NOT DO AWAY WITH THE WARRANTY OF SEAWORTHINESS.

1. Whatever may be the meaning of the expression "due diligence to make the said vessel in all respects seaworthy," as used in the 3rd section, it is evident that Congress did not intend to lessen the obligation of vessel owners as to seaworthiness.

The 1st section provides, "that it shall not be lawful for the manager, agent, master, or owner of any vessel * * * to insert in any bill of lading or shipping document, any clause * * * whereby it, he, or they shall be relieved of any liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise."

The 2d section provides, "that it shall not be lawful * * * to insert in any bill of lading or shipping document any covenant or agreement, whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage * * * shall in anywise be lessened, weakened, or avoided."

It is not necessary to analyze the 2nd section grammatically and according to punctuation. As the section is printed in the Statutes at Large and the Supplement to the Revised Statutes, it seems clear that the obligation of the owner is to make his vessel seaworthy and not to exercise due diligence to make her so. This is shown (1) by the use of the plural, *obligations*, not *obligation*, and (2) by the omission of the word "to" between *due diligence* and *properly equip*.

2. Apart from these verbal considerations, it is evident that Congress intended by the 2nd section that the existing obligation of a ship owner to furnish a seaworthy vessel should not be lessened, weakened, or avoided. If Congress had meant to relax this rule, it should have said so in distinct and unequivocal terms.

The warranty of seaworthiness which exists in all contracts of carriage at sea, and in all policies of marine insurance should not be lessened, weakened, or avoided by a free or loose interpretation of a statute. In the case of the *Main* (152 U. S., 122, 132) the Supreme Court held that the limitation of liability statutes should be strictly construed, saying :

"While, from the universal habit of insuring vessels, the application of the statute probably results but rarely in an actual injustice to the owner of an injured vessel, yet, being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purpose of Congress."

The learned District Judge relied on the case of Hedley *v.* Pinkney S. S. Co. (1894, Appeal Cases, p. 222), which he says is a case quite like the present. The provisions of the Merchant Shipping Act, he says, are "equally stringent with our own act, as respects the obligations of the owner to make and keep the ship seaworthy."

There is no analogy between the Hedley case and the case at bar.

Section 5 of the Merchant Shipping Act, 1876, provides that in contracts with seamen "there shall be implied an obligation on the owner of the ship, that the owner of the ship * * * shall use all reasonable means to insure the seaworthiness of the ship for the voyage * * * and to keep her in a seaworthy condition for the voyage."

In the Hedley case the House of Lords had to deal with the question of the liability of a master to a servant. The present case turns on the liability of a carrier to cargo—an entirely different relation. The master has never been an insurer of his servant, and ordinary care and diligence are the measure of his obligation. "All reasonable means to insure the seaworthiness of the ship" for the sailors is a far different thing from the due diligence required of a carrier of passengers or the absolute warranty of seaworthinesss of a carrier of goods.

3. The obligation of seaworthiness includes two distinct ideas. The primary one is that the *vessel* itself shall be fit—*rem ad usum habilem*—a warranty absolute. The other obligation is as to the master, pilot, crew, stores, and supplies. These are not warranted in the same sense as is the ship.

More accurately, the owner's duty is to use due diligence to have a master competent and qualified, a capable and sufficient crew, and that the coal, supplies, and equipment shall have been carefully and properly provided, although the owner does not warrant that they shall actually last through the intended voyage.

The second section of the Harter Act clearly recognizes this distinction.

The 3rd section deals with acts of persons, and contains no exception as to the fitness of the carrying *res*. Its purpose is to relieve against accidental, and even culpable, casualties that may be caused by acts of tne servants of the shipowner when out of his control. The opening clause relating to seaworthiness must be construed as applying to the personal capacity of master and crew, and the supplies and outfit that fall under the owner's duties of due diligence. The exceptions in this 3rd section are twofold: (1) those liabilities for irresistible external force and those defects in the cargo itself, which, unless excepted, might be included in the liability of the carrier as insurer; and (2) those faults and errors personal to the shipowner's servants, however carefully chosen, when beyond the owner's control.

The first are:

dangers of the sea,
acts of God, or public enemies,
inherent defect or vice of the thing carried,
seizure under legal process,
loss resulting from act or omission of the shipper or owner of the goods.

All of which are familiar bill of lading exceptions.

The second are:	Formerly excepted as:
Faults or errors in navigation or management of the ship.	Collisions, strandings, or other accidents of navigation.
Saving life or property by deviation at sea.	Liberty to tow and assist vessels in all situations.

Although the 3d section speaks of defects in the thing *carried*, it does not cover defects in the ship. It does not purport to excuse faults or management of the ship *and cargo*. It

leaves no loop-hole to say that the carrier is let out of liability for his ordinary duties to have a fit ship and to take due care of the property bailed.

To have the meaning now contended, the section would have to read :

If the owner, etc., shall exercise due diligence to make said vessel seaworthy and do all that he can to employ suitable men in order to make her capable of performing her intended voyage, and properly manned, equipped, and supplied, neither the vessel, her owner, etc., shall be held responsible for damage or loss resulting from faults or errors by the persons so selected to prepare the ship, nor for any defects in the ship, which in spite of the owners' diligence may be undiscovered or unknown, whether in hull or machinery, equipment or appliances; or from the omission to close, secure, or fasten the ports, cocks, valves, or pipe connections, or from other omissions of the servants of the shipowner to keep said vessel fit and tight during loading, or to take proper care of the cargo while loading, on said vessel, during its discharge or after landing, and while on any wharf warehouse or quay.

But counsel for the shipowner say we have all this in one word—Management.*

As is shown by the debates in Congress, the statute is aimed mainly at steam vessels. Such a steamship is no longer a mere "structure made to float on the water, whether propelled by sail, steam, or oars." If such a steamship had only means of propulsion, "faults in navigation" might have sufficed.

Besides propelling machinery there is other mechanism intricate and complex, the care of which is no part of the duties of navigation. Such for example are the ventilating and refrigerating engines, and the dynamos and other appliances of a modern mail steamer. To cover faults in the operation of these auxiliary parts, more than the word navigation is needed, especially in view of the settled rule of construction of

---

* The appellee's contention is supported by one authority, Lewis Carroll, who says :

"When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that is all."—*Through the Looking Glass, p. 124.*

statutes in derogation of the common law. The word management is brought in to remove this doubt and fitly supplements the term navigation.

To argue from this one word, taken from its context, that Congress has undone the ancient liability of shipowners and that the declared intent of the two former sections is thereby nullified is too extravagant to be seriously entertained.

IV.—THE HARTER ACT IS TO BE CONSTRUED IN ACCORDANCE WITH THE STATE OF PRE-EXISTING LAW, THE VARIOUS EFFORTS MADE TO AGREE ON A DIVISION OF THE CARRIERS' LIABILITIES, THE STANDARD FORMS OF BILLS OF LADING WHICH COMMERCIAL BODIES HAD ADOPTED BEFORE 1893, AND THE EXIGENCIES WHICH LED TO THE PASSAGE OF THE ACT.

In construing this statute, this Court has already referred to the recent commercial history of this country and Europe.

The Delaware, 161 U. S., 459, 472.

The efforts at reform in bills of lading, begun in 1881, show that it was always recognized that the shipowner must first make his ship fit for the voyage. Only after such preparation of the vessel, could he claim to be relieved from the faults of his servants in its navigation.

In 1882 the Association for the Reform and Codification of the Law of Nations outlined the basis of a fair division of liabilities between ship and cargo as embodied in bills of lading and contracts of affreightment. The following resolution was then adopted:

RESOLUTION OF 1882.

"That the principle of the common form of Bill of Lading should be this: That the shipowner, whether by steam or sailing ship, should be liable for the faults of his servants in all matters relating to the ordinary course of the voyage, such as the stowage and right delivery of the cargo, and other matters of this kind; but, on the other hand, the shipowner should be exempt from the liability for everything that comes under the head of 'accidents of navigation' even though the loss from these may be indirectly attributable to some fault or neglect of the crew."

A form of bill of lading was accordingly prepared and adopted at the meeting, which contained a negligence clause as to "collisions, strandings, and other accidents of navigation," and other exemptions. This was soon objected to by various influential associations both of English underwriters and various Australian and New Zealand underwriting agencies.

Wendt Maritime Legislation, 3d edition, pp. 398-401.

On October 28, 1884, the New York Produce Exchange dealt with this proposed bill of lading, and the Committee made a report, in which they stated in reference to the special question of shipowners' liability:

"The most important one of these clauses, viz., the exemption of the carrier from liability for losses caused by the default of any servants of the ship, provided the owner or manager has done his duty, has been fully preserved. Your Committee beg to reiterate the statement made by the framers of the bill of lading submitted to them for revision, in which they pointed out that this exemption is in conflict with the doctrine hitherto held by our Federal Courts, though it has for a long time been sanctioned by custom and by the all but general practice of underwriters. Your Committee are equally decided in their opinion that this exemption is demanded by the circumstances under which modern steamship traffic is carried on and that our Federal Courts will not much longer be able to resist a change so eminently just and necessary. *Your Committee may add that the carriers' liability for the seaworthy condition of his ship and for good stowage is in no way affected by these clauses.*"

Wendt, p. 408.

A subsequent meeting held at Lloyds, London, February 4, 1885, reviewed this question. In the attempt to reconcile underwriters and shipowners, Mr. Norwood, Member of Parliament, was reported as saying:

"He, however, ventured to think in the first place that there were many members of Lloyds and subscribing members who were not underwriters, but he also took a broader ground and he thought it a great pity that they should define the relations between the shipowners and underwriters. His view was that they were all, underwriters, shippers and merchants, mutually interested in the settlement of the question. He entirely dissented from the view of Mr. DaCosta

that if the liability of shipowners for negligence, accidents and default of their masters and mates at sea were removed or reduced, there would be a great increase of losses. The position which he took, and which he believed every shipowner took, was that *it was not only his legal, but his moral, duty to make the ship seaworthy, to man her properly*, and to conduct his business so far as the ship was in his control to the best of his ability; and if there was any default on the part of the shipowner in a matter in which he had control he (Mr. Norwood), would be the last to ask to be relieved from the responsibility."

Wendt, p. 413.

Mr. Dale of Liverpool, said:

"In New York, however, (by no means an unimportant commercial community) the principle had been conceded, and though the decisions of the American courts had hitherto been adverse to the shipowners, the steamship owners and shippers combined had agreed on a bill of lading which was satisfactory to both parties. The Liverpool shipowners had recently endeavored to push these concessions somewhat further, and had sought to exempt themselves from responsibility as to *seaworthiness and proper stowage*. That had been resolutely withstood by Liverpool underwriters."

Wendt, p. 415.

Other meetings were had with like effect. The discussions led to nothing definite, until the meeting of the Association for the Reform and Codification of the Law of Nations, under the presidency of Dr. Sieveking, at Hamburg in August, 1885. That conference unanimously adopted the following rule, which is almost the wording of § 2 of the Harter Act:

"It shall not be lawful to insert in the bill of lading any clause, covenant, or agreement whereby the obligations of owners to properly equip, man, provision and outfit the vessel *and to render her seaworthy* and capable of performing her intended voyage shall in any wise be lessened, weakened or avoided; and all provisions and clauses to the contrary shall be null and void and of no effect in law."

Wendt, p. 442.

After the passage of this general resolution, special rules were adopted, known as the Hamburg Rules of Affreightment. The first was:

"1. The shipowner shall be responsible that his vessel is

properly equipped, manned, provisioned and fitted out, *and in all respects seaworthy*, and capable of performing her intended voyage, and for the stowage and right delivery of the goods. He shall also be responsible for the barratry, faults and negligence, but not for errors in judgment, of the master, officers or crew."

Wendt, p. 466.

In September and October, 1885, the Congress called by the Belgian Government at Antwerp passed a still more onerous provision, as follows:

"The owners of ships are civilly responsible to the freighters and shippers for the acts of their captains and their officers relative to the cargo, provided they cannot prove that the damage was caused by *force majeure*, by *vice propre* of the merchandise, or by the fault of the shipper.

"It is, however, lawful for the parties to vary this responsibility by special stipulations, with the following exceptions:

"Owners of ships should be prohibited from relieving themselves in advance of their responsibility by inserting a clause in the contract of affreightment, the bill of lading, or by any other agreement:

"(*a*) For any acts of their captains or their officers tending to compromise the seaworthiness of the ships.

"(*b*) For any act which would cause damage through improper stowage, want of care, or incomplete delivery of the goods confided to their care."

Wendt, p. 477.

The English Committee appointed at the previous London Conferences in December, 1885, reported a proposed Act of Parliament, containing, *inter alia*, the following:

"Any provision or exception in any bill of lading or any agreement purporting to relieve or exonerate in any way any shipowner *from any duty to properly equip, man, provision and fit out any ship and to render it seaworthy*, or from any implied warranty of seaworthiness in a contract of affreightment, shall be null and void."

Wendt, p. 484.

Early in 1886 it was publicly announced that the Chambers of Commerce of Hamburg and Bremen and the Associations of Shipowners in those ports had agreed upon a uniform bill of lading, the first rule of which was:

"The shipowner is responsible for the proper fitting out of

the vessel *and for its being equipped, manned and provisioned and in a seaworthy condition* capable to undertake the intended voyage. Also for errors or negligence of his employees, respecting proper stowage, care, treatment and delivery of the cargo, all agreements and clauses to the contrary to be null and void with no legally binding force."

Wendt, p. 490.

At the meeting of the Association for the Reform and Codification of the Law of Nations, held at the Guildhall, in London, July 25, 1887, the following resolution was adopted :

RESOLUTION OF 1887.

" That the following principle adopted by the Conference of this Association held at Liverpool in 1882 be now confirmed and adopted as the basis of discussion : that the principle of the common form of bill should be this :—That the shipowner whether by steam or sailing ship should be liable for the faults of his servants in all matters relating to the ordinary course of the voyage such as the stowage and right delivery of the cargo and other matters of this kind ; but on the other hand, the shipowner should be exempt from liability for everything which comes under the head of accidents of navigation, even though the loss from these may be indirectly attributable to some fault or neglect of the crew."

Wendt, p. 493.

The British Royal Commission on Loss of Life at Sea made their report on August 27, 1887, in which they made the following recommendation :

" We think no shipowner ought to be relieved by contract or otherwise *from the legal obligation to properly equip, man, provision, outfit, and render said ship seaworthy for performing her intended voyage*, nor from the legal obligation to properly stow and deliver her cargo, as agreed by the terms of shipment (except as to the stowage of chartered vessels loaded under direction of the charterers)."

And under the final summary of recommendations, the following :

" 12. That any provision in a bill of lading or other agreement having for its object or effect to avoid or limit the liability of the shipowner in respect to goods shipped under it, should have no legal validity *if the loss has been occa-*

sioned by the ship having been sent to sea in an unseaworthy condition, unless he proves that he or those to whom he commits the management of his business, used all reasonable means to make and keep the vessel seaworthy."

In July, 1888, the Northern Maritime Conference assembled at Copenhagen, with delegates from the Scandinavian countries, including Finland, and, among other points, discussed the progress of bill of lading reform, more particularly the resolution twice adopted by the Association for the Reform and Codification of the Law of Nations. In the publication by their committee they stated :

"By this resolution result has been arrived at which on the whole agrees with that which in the meantime had been adopted by similar transactions in the United States of America, and which in our opinion is as good as it is possible to attain by private exertion, as the shipowners retain responsibility for everything respecting the equipment and *seaworthiness* of the ship, the stowing, preservation and proper delivery of the cargo, but are exempted from all consequences of accidents occurring during the voyage, whether they are a consequence of *vis major* or of the faults or errors of the master or crew."

> Memorandum prepared by Committee of the Second Northern Maritime Conference, Copenhagen, 1888, p. 33.

In October, 1892, the Association for Reform and Codification of the Law of Nations met at Genoa. (On June 10, 1892, Mr. Harter had offered in the House of Representatives his bill (H. R., 9176) which, as finally revised and modified in committee, became the Act of February 13, 1893.) Four months afterwards Mr. McArthur, of Liverpool, in addressing the Association, said :

"A bill has been introduced into Congress which has been favorably reported upon by a committee of the House of Representatives by which it is proposed that the shipowner shall be relieved of all responsibility for loss or damage to cargo resulting from error of judgment in the navigation or management of the vessel, *if it is true that she was in all respects seaworthy on sailing.*"

This summary of the efforts of publicists, associations of commercial men, shipowners, and underwriters to bring about

a reform in bills of lading, and the practical basis of agreement reached, shows that the seaworthiness of the ship was recognized, first and last, as the condition of any relief from the subsequent negligence of the servants of the shipowner. The proceedings in Congress resulting in the passage of the Harter Act are but a ratification of the agreement reached by these associations in the great maritime centres of Europe.

V.—BUT IF THE SEVERITY OF THE OBLIGATION WHICH HAS HERETOFORE RESTED ON THE SHIPOWNER TO FURNISH A SEAWORTHY SHIP HAS BEEN RELAXED, THE STRICT OBLIGATION OF DILIGENCE SUBSTITUTED THEREFOR HAS NOT BEEN SATISFIED BY THE OWNERS OF THE SILVIA.

Manifestly the burden is on the person seeking to avail himself of the exemption afforded by the statute to show strict compliance with the conditions expressly required.

Especially where the application of the statute is in derogation of the common law.

The *Main*, 152 U. S., 122, 132.

In this case, unlike others which have recently been brought into this Court by *certiorari*, the shipowner has failed to make even *prima facie* proof of the exercise of diligence.

Thus in the case of the *Delaware* (161 U. S., 459), where no claim was made that the ship was defective in any respect when she started on her voyage, the shipowner took the testimony of the Marine Superintendent of the owners for the purpose of proving that diligence was used by them to make the ship in all respects seaworthy, etc. The present is the only case of those in which the Harter Act has been invoked as a defense where the owners have made no effort whatever to prove the exercise of diligence.

The only evidence adduced by the appellee is as follows:

"Q. In what sort of general navigable condition was this vessel maintained by the owners? A. First class.

"Q. Was she wanting in any respect so far as you know? A. No, sir."

Clark, p. 11.

In view of the fact that new ports had been put in in London on the previous voyage, it was especially incumbent upon the claimant to prove the exercise of due diligence.

Yet on this evidence the District Judge assumed the exercise of due diligence, and the Circuit Court of Appeals followed him in this assumption.

The District Judge said:

"In supplying the usual iron covers, the owners had used due diligence to make the ship seaworthy, as regards these ports, and fulfilled their obligations in this regard under the act of February 13, 1893, so as to bring themselves under its protection."

Opinion of District Judge, p. 49.

The learned Judge thus assumed the very thing to be proved. He assumed that the port thus broken was a "proper" port, that the glass was a "proper" glass.

So the Circuit Court of Appeals said: "In the present case the vessel owners certainly did exercise due diligence to make the vessel seaworthy."

Opinion of Judge Wallace, p. 55.

The present case was the first decision on the Harter Act in a suit for damage to cargo. The learned District Judge has since considered the Act many times, and has adopted a much severer standard of diligence than that applied in this case, and has required far more stringent evidence thereof.

In the *Millie R. Bohannon* (64 Fed. R., 883), he said:

"'Due diligence' requires a carefulness of inspection and repair proportionate to the danger. The *Edwin I. Morrison*, 153 U. S., 199, affirming 27 Fed., 136. The sudden and heavy leaks, when a few days out of port, on mere rolling in a calm, are as inconsistent with 'due diligence' to make the centreboard seam tight as they are inconsistent with seaworthiness, *i. e.*, reasonable fitness for the voyage. '*Res ipsa loquitur.*'"

In the *Sintram* (64 Fed. R., 884), he said:

"The evidence shows all reasonable and customary care and diligence to make the ship sufficient, so far as human foresight could perceive before sailing; that the regulations in that

regard at Hong Kong are among the most stringent; and that the surveyors of the insurers of cargo inspected the vessel and suggested nothing further to be done; and that she rated in the highest class."

In the *Mary L. Peters* (68 Fed. R., 919), he held "that there was no such 'due diligence' exercised by the persons employed by the owners to see to the repair of the ship as to exempt the ship and owners"

In the *Flamborough* (69 Fed. R., 470), he held that the shipowners were chargeable with any negligence of their agents appointed to inspect the steamer.

In the *Alvena* (74 Fed. R., 252), he said:

"The requirement of 'due diligence,' however, is not satisfied by the mere appointment of competent persons to repair. Due diligence in repair and equipment must be exercised in fact."

In the *Colima* (82 Fed. R., 665, 678), he said:

"This section" (the 3rd section of the Harter Act) "has been in several cases adjudged to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea. The act requires, in other words, due diligence in the work itself. The *Mary L. Peters*, 68 Fed., 919; The *Flamborough*, 68 Fed., 470; The *Alvena*, 74 Fed., 252, affirmed 23 C. C. A., 261, 79 Fed., 973; The *Rossmore* [1895], 2 Q. B., 408. On any other construction, owners would escape all responsibility for the seaworthiness of their ships by merely employing agents of good repute, whether any diligence and care to make their vessels seaworthy were in fact exercised or not. On reason and sound policy no such intent in the statute can be supposed. The context and the pre-existing law indicate that the intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of diligence to make the ship seaworthy. This difference is of great importance, as it avoids responsibility for latent and undiscoverable defects. *But the warranty of diligence remains; and this requires the application of the usual rule, that the acts and negligences of the agent are deemed those of the principal.*

"From other language in the third section of the acts the same result follows. For it exempts only from losses by fault 'in the navigation or management' of the vessel, and from

'dangers of the sea.' But a danger of the seas (the clause here invoked), by its settled meaning, *does not include a danger which would have been avoided by the use of due diligence in loading* or management, and that part of the section would therefore not apply."

VI.—THE OMISSION TO CLOSE THE DUMMY WAS NOT A FAULT OR ERROR IN NAVIGATION OR IN THE MANAGEMENT OF THE VESSEL UNDER SECTION 3 OF THE HARTER ACT.

Plainly it had nothing to do with the *navigation* of the ship.

In the strict sense of the word it did concern the management of the ship. But the words *navigation* and *management* are used to indicate the same or nearly the same thing. Management means *nautical* management.

In the act as it passed the House, the words were "for damage or loss resulting from error of judgment in navigation, or in the management of said vessel, *if navigated with ordinary skill and care*, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery, nor shall the owners, etc."

The clause italicized shows that the word *management* was used in order to make it clear that the word *navigation* was not used in its technical sense as limited to directing the course of the ship by taking observations, etc., etc., but in the broader sense of making a voyage, which would include management of the vessel for the purpose of navigating her, in other words, seamanship, etc.

The title of the act tends to confirm this view—"An Act relating to *navigation* of vessels, etc."

Navigation:

"(*a.*) The science or art of directing the course of vessels as they sail from one port of the world to another. The management of the sails, etc., the holding of the assigned course by proper steering, and the working of the ship generally pertain rather to seamanship, though necessary to successful navigation. The two fundamental prblems of navigation are the determination of the ship's position at a given moment

and the decision of the most advantageous course to be steered in order to reach a given point."

The Century Dictionary.

"Navigation is (*a.*) the science or art of conducting ships or vessels from one place to another, including more especially, the method of determining a ship's position, course, distance passed over, etc., on the surface of the globe, by the principles of geometry and astronomy. (*b.*) The *management* of sails, rudder, etc., the mechanics of travelling by water; seamanship."

Webster's Dictionary (1897).

The Standard Dictionary, Vol. II., under *Navigation*, states:

(2.) "The *management* of the sails, steering apparatus, etc., or the working of a ship generally, more properly seamanship."

Some of the English cases have extended the use of the word navigation so as to cover anything done before or during the voyage for the purpose of navigation. Thus it has been held that leaving open a sea-cock, or having a cargo port insufficiently fastened, or omitting to have the rudder fastened with a proper pin are matters of improper navigation.

Good *v.* London Association, L. R., 6 C. P., 563.
Carmichael *v.* Liverpool Assoc., 19 Q. B. D., 242.
The *Warkworth*, 9 P. D., 20; on appeal, *ib.*, 145.

The first two cases were against indemnity associations on their agreements to indemnify the owners of a steamship against any loss or damage "which, by reason of the *improper navigation* of any such steamship, may be caused to any goods, etc., on board such steamship."

The *Warkworth* was a limitation of liability proceeding, in which the defendants pleaded that the damage was not caused by reason "of any improper navigation of the *Warkworth* within the meaning of the Merchant Shipping Act, 1862, §54, sub-sec. 4."

In one of the cases cited Lord Esher said that "if there be negligence before the navigation of the ship commences—negligence of the owner or his servants—which has the effect of

causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that makes the navigation under those circumstances improper navigation by the ship-owner, or those for whom he is liable."

Carmichael *v.* Liverpool Assoc., 19 Q. B. D., 248.

There are no decisions in this country which go so far as these English cases, and we submit that in interpreting a statute this Court should adopt a principle of interpretation applied by the English Courts to an insurance or indemnity contract.

But the English courts themselves have taken a different position in interpreting these words in contracts of carriage.

Thus in *The Ferro* [1893], P. 38, Sir Gorell Barnes said:

"I think it is desirable also to express the view which I hold about the question turning on the construction of the words 'management of the ship.' I am not satisfied that they go much, if at all, beyond the word 'navigation.' Some things may be suggested to which the word 'management' is, perhaps, applicable beyond that of 'navigation,' but I feel that it is not such clear and expressive language as to include within it the words 'improper stowage.' It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of a cargo."

And in *Dobell* v. *S. S. Rossmore Co.* [1895] 2 Q. B. 408, 415, Kay, L. J., said:

"It was argued that the damage to the cargo was less or damage resulting from faults or errors in navigation or in the management of the ship. It does not seem to me to be necessary to give any decided opinion on this point; but I incline to think, contrasting the various clauses of the bill of lading, that the expression 'faults of errors in navigation or in the management of the said vessel' applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel, than to a matter of this kind."

And in the same case A. L. Smith, L. J., said:

"It is not necessary to decide what is the interpretation of the expression 'faults of errors in navigation or in the management of the vessel.' I may say, however, that I think that the meaning of the section is that, if the shipowner by himself or his agents uses due diligence to make the ship sea-

worthy when she starts, he shall not be liable for what happens afterwards when the ship is at sea and he has no more control over her."

In the case of *The Glenochil* [1896], P. 10, after the arrival of the vessel at her port of destination and during the discharge of the cargo, the engineer ran water into a ballast tank in order to stiffen the ship, but negligently omitted to ascertain the condition of the sounding pipe and casing, which had, owing to heavy weather during the voyage, become broken. The Divisional Court held the ship-owner exempt from liability by reason of the Harter Act, holding that this damage resulted from a fault in the management of the vessel and the operation of the exemption as to management extended to the period during which the cargo was being discharged. In his judgment Sir Francis Jeune emphasized the distinction between what occurs before the beginning of the voyage and what occurs during the voyage. He says:

"Now, is this a fault in the management of the vessel within the meaning of the bill of lading? It is not necessary to deal with it as a question of navigation. It is sufficient to deal with it as a question of management. It is said, however, that the two things are one and the same, and that management and navigation mean the same thing, because the management is only in the navigation; and no doubt upon that a formidable argument arises, for it is put upon a dictum, though only a dictum, of Kay, L. J. It is said that that learned Judge expressed the view (1) that, 'contrasting the various clauses of the bill of lading,' the expression 'faults or errors of navigation or in the management of the vessel' applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel, than to matter of this kind. But when one considers what the matter then in question was, namely, that it was something antecedent to the commencement of the voyage, although part of the cargo had been put in, and that it was a fault connected with the construction of the ship, or, at any rate, the seaworthy condition of the ship, one sees, I think, that what the Lord Justice really had in his mind was not a contrast between the management of the vessel while sailing and while lying in harbour, but rather a contrast between the state of the ship, as a matter of seaworthiness, and mismanagement of the ship during the voyage. That, I think, is not an unreasonable view to put upon the Lord Justice's words; and it seems to me clear that the word 'management' goes somewhat beyond—perhaps not much beyond—navigation, but far enough to take in

this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself. This Court had before it the same sort of question in the case of *The Ferro*, and I adhere to what I said then, that mere stowage is an altogether different matter from the management of the vessel. It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo."

(1) Dobell *v.* Steamship Rossmore Co. [1895], 2 Q. B., 408, at p. 415.

This distinction between acts occurring before the beginning of the voyage and those occurring during the voyage is fundamental.

In the case of *Steel* v. *State Line S. S. Co.* (L. R., 3 App. Cas., 72), the exceptions of the bill of lading were very broad:

"Not responsible * * * for any of the following perils, arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise."

The Lord Chancellor (Cairns), in his judgment, said, in relation to the stipulation: "Looking at all that is mentioned between those two termini in the bill of lading, it appears to me that everything which is mentioned is matter subsequent to the sailing of the ship with the goods on board" (p. 78).

This distinction is brought out with great clearness by the continental authorities, several of which are cited in the brief for the appellant in the case of the *Carib Prince*, No. 45.

4. The sugar damage was not a "damage or loss resulting from fault or error in navigation or in the management" of the vessel. It resulted from the unseaworthiness of the ship.

Under the strict construction required by the authorities, if the damage, although due in part to an error in the management of the *Silvia*, would not have occurred had the ship been seaworthy, then the ship cannot escape liability.

In order to avail himself of the statute it is not enough for

the shipowner to show that the loss may have resulted from a fault or error in navigation or in the management of the vessel. He must show (1) that he has exercised due diligence to make his vessel seaworthy, and (2) that the loss or damage did not result from unseaworthiness, but from an error in navigation or in the management of the vessel.

VII.—By the absolute undertaking in the charter party to have the ship fit for the voyage, the claimant has precluded itself from any exemption under the Harter Act.

The charter party (p. 5 and pp. 44–6), the provisions of which the claimant has invoked as a defense in its answer (p. 3), provides expressly that the vessel shall be "tight, staunch, strong and in every way fitted for such a voyage" (p. 44). This is equivalent to an absolute warranty that she is so.

The Edwin I. Morrison, 153 U. S., 199.

In the case of Hine *v.* The N. Y. & Bermudez Co. (68 Fed. R., 920), Judge Brown said:

"The Harter act does not interfere with the liberty of contract in regard to the proper fitting of the vessel for the voyage, or with any contract the parties may make as respects the responsibility for the sufficiency of special fittings, or as regards other matters not within the prohibition of that act."

And in the case at bar Judge Wallace said:

"Doubtless the act does not prevent the carrier from waiving by contract with the cargo owner those provisions which relax his ordinary obligations. He may do so by a charter party or bill of lading containing an express warranty of seaworthiness, or by a foreign contract with the provision that it shall be governed by the law of the place of the contract."

Record, p. 55.

But in the present case both the District Court and the Circuit Court of Appeals have relieved the shipowner from an obligation deliberately assumed by him in the charter.

VIII.—The decree of the Courts below should be reversed and the cause remanded to the District Court of the United States for the Southern District of New York, with directions to enter a decree for the libellant, with costs.

February, 1898.

Harrington Putnam,
Charles C. Burlingham,
Advocates.

APPENDIX.

DECISION OF THE COURT OF APPEAL IN G. DOBELL & CO. *vs.* S.S. ROSSMORE COMPANY. (Law Reports [1895] 2 Q. B., 408.)

Appeal from the judgment of LAWRENCE, J., at the trial of the cause without a jury.

The action was by the owner of goods shipped under a bill of lading at Baltimore for delivery in Liverpool and damaged in transit. It was admitted at the trial that there was a porthole to the ship above the water-line for use in loading cargo, and that if properly caulked and tightly screwed down it would not admit water when the vessel was at sea. Before she started on her voyage the porthole was closed by the ship's carpenter, but in such an imperfect manner that it was not watertight, and during the voyage, as the porthole was submerged from time to time by the rolling of the vessel, water got in through it and damaged a part of the cargo. The appliances for closing the porthole were sufficient and in good order, and the competency of the ship's carpenter for the duties he had to perform was not disputed. The part of the ship into which the porthole opened was filled with cargo which would have to be removed before access could be obtained to the porthole. The bill of lading contained the following clauses: "Neither the vessel, her owners, agents or charterers shall become, or be held responsible for damage, or loss resulting from faults, or errors in navigation, or in the management of said vessel, provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped and supplied * * * not accountable for the unseaworthiness of the vessel at the commencement of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness) or otherwise howsoever. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893."

[Here follows the Act of Congress.]

The learned Judge gave judgment for the plaintiffs.
The defendants appealed.

Lord Esher, M. R.: This case arises on a bill of lading of goods which were to be brought from America to England, and which were damaged on the way by reason of water having got into the ship through a porthole. The shipper of the goods has brought an action in respect of the damage done to them, and the shipowner contends that he is not liable, as the case comes within the exceptions of the bill of lading. That document has brought in by reference the provision of an American Act of Congress, and what we have to do is to construe the bill of lading, reading into it as if they were written into it the words of the Act of Congress. If this is done it will have this effect: that some provisions will appear twice over, because they have put words extremely like those of the Act into the bill of lading, and then introduced the whole of the Act. That would, of course, do no harm, but it is clumsy to the last degree.

The bill of lading has these words in it by way of exception, "Neither the vessel, her owners, agents or charterers shall become, or be held responsible for damage, or loss resulting from faults, or errors in navigation, or in the management of said vessel," followed by this proviso, "provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped and supplied." The matter stands then, that unless the conditions of the proviso are fulfilled the exceptions which precede do not apply. They then introduce into their bill of lading the words of the Harter Act, which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading. In the 3rd section of the Act so incorporated the exception which is to relieve the shipowner is made to depend on the condition that the owner of the ship—that is, the owner of this particular ship—shall exercise due diligence to make the vessel in all respects seaworthy. If he does not do that the exceptions in his favor do not take effect. It is contended that the meaning of the clause is that if the owner personally did all that he could do to make the ship seaworthy when she left America, then, although she was not seaworthy, by the fault of some agent or servant, the owner is not liable. Can that be the meaning of the contract with regard to this ship? The owner was not at the port from which the ship sailed. The company who own the ship cer

tainly was not there, and could not be there; but neither was the manager, or managing director, or some other person who might represent the company. No one was there who could possibly be called the owner; and this was known to both parties to the contract. It is obvious to my mind, from a consideration of the facts of this case, that the words of the third section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port. Now, who was the agent at the port who was to look after the ship? If there was an agent there who employed the ship's carpentor he ought to have overlooked the carpenter and seen that the ship was seaworthy. If it was the carpenter who was the agent for this purpose, then it was his duty to see that the ship was seaworthy when she started. If she was not seaworthy when she started, it was the fault either of the agent employed to look after the carpenter or of the carpenter himself. In either case, there was a person employed by the owner, or on behalf of the owner, to see to the fulfilment of the condition that the owner had taken on himself by his contract, that the ship should be seaworthy when she started.

Now comes the question. Was the ship seaworthy when she started? There was a porthole through which water could come. If that had been all, and there had been the means of immediately closing the porthole, the matter would have been otherwise. But here there were no facilities for closing the porthole, for it could only be closed after the removal of a considerable part of the cargo; so that if there were rough weather or a storm, the water would be coming in all the time until the porthole could be got at and closed. It seems to us impossible to say that she was seaworthy at starting, so that she could perform an ordinary voyage without damage to the cargo. Her unseaworthiness was the fault of some one employed by the owner as his agent, for the purpose of making the ship seaworthy before she started. That is the same as if the owner himself had been guilty of the negligence complained of. In this view of the case, neither *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (1), nor the decision in the case cited from the United States Circuit

Court of Appeals, have any bearing on the matter. (The *Silvia.*) I do not think we are derogating from our decision in the former case. This particular case is peculiar to itself. The owner was not relieved from his responsibility, and the judgment of the learned Judge at the trial must be supported.

(1) 19 Q. B. D., 242.

KAY, L. J.: This bill of lading must be read as if the words of the Harter Act were set out at length in it. I confess my opinion as to the meaning to be placed on it has somewhat fluctuated during the argument; but upon the whole I think the result is that the owner of the ship meant, upon a certain condition, to exempt himself from the effect of any damage or loss resulting from faults or errors in navigation or in the management of the vessel. I agree with the argument that this means during the voyage, because of the contrast with the condition on which the exemption is given, by which the owner is to exercise due diligence to make the vessel in all respects seaworthy, and properly manned, equipped and supplied.

The second point argued was that what happened was a fault in navigation or in the management of the vessel. There was a porthole in the ship intended to facilitate the loading of cargo. It was supplied with a cover which could be fastened down, so as to prevent water getting into the ship. The equipment was all perfectly right; but water got in because the porthole was insufficiently closed, and so the cargo was damaged. It was argued that the damage to the cargo was loss or damage resulting from faults or errors in navigation or in the management of the ship. It does not seem to me to be necessary to give any decided opinion on this point; but I incline to think, contrasting the various clauses of the bill of lading, that the expression "faults or errors in navigation or in the management of the said vessel" applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel, than to a matter of this kind.

The main question in the case is whether the owners fulfilled the condition upon which they are entitled to exemption, by the exercise of due diligence to make the vessel in all respects seaworthy, and properly manned, equipped, and supplied. It

was not denied that she was unseaworthy in fact, and it could not be denied after the decision of the House of Lords in *Steel* v. *State Line Steamship Co.* (1). In that case Lord Blackburn said in effect that if there was a porthole in a ship left unfastened, and the cargo was stowed in such a way that it would take a considerable time to get at the porthole and fasten it, the ship would be unseaworthy; but that if it could be shut directly the necessity arose, the ship could not be said to be unseaworthy; and this view is confirmed by Lord Herschell in the more recent case of *Hedley v. Pinkney & Sons Steamship Co.* (1). We have, therefore, the strongest authority for saying that in this particular case the ship was unseaworthy, because it is admitted that this porthole could only be got at during the voyage by shifting the cargo—a matter which would involve a considerable expenditure of time and labour.

The essential question then is. Was there want of due diligence on the part of the owners?

(1) 3 App. Cas., 72.
(1) [1894.] A. C., 222.

It is said that they did all that they could by providing proper equipment and appointing proper agents. It was the duty of the ship's carpenter to close this porthole, and they appointed a carpenter to whose competence no one makes any objection. It is said, therefore, that they personally exercised diligence, and thereby fulfilled the condition. I do not agree with this contention. It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent. It is obvious that the shipowner cannot himself with his own hands make the ship seaworthy; he must act through other persons; but I do not read the contract as exempting him from liability in the case of the negligence of the agents whom he employs to act for him in this respect. It seems to me that the owner has not fulfilled the whole of his duty within the terms of the contract merely by appointing a competent shipwright, and that he has not fulfilled the condition upon which alone he is entitled

o exemption. I think, therefore, that the learned Judge was tright in holding that the owner was liable.

A. L. Smith, L. J. : This is an action by the owner of goods against the shipowner on a bill of lading for damage to cargo, and the defence is that the latter is exempt by the terms of the bill of lading. There can be no doubt on the authorities that when the ship started on her voyage she was unseaworthy, but the defendant still claims to be exempt. The material part of the bill of lading is the clause which incorporates the Act of Congress of February 13, 1893, and the bill of lading must be construed as if the provisions of that Act were actually incorporated into it.

That brings me to consider what is the meaning of the sections of the Act. The purview of ss. 1 and 2 is that the shipowner shall not put into the bill of lading any clause exempting himself from damage to cargo by reason of the negligence of himself or his servants. As I read clause 3, it is a provision in favor of the shipowner, just as the first two clauses are directly against him. In clause 3 what is the meaning of the expression, "If the owner shall exercise due diligence to make the vessel in all respects seaworthy"? Does it mean by himself, with his own hands and eyes? If that be the meaning of the clause, it could hardly be applied in one case out of fifty, for evidently the shipowner is not upon the spot to see to the matter. In my opinion it does not mean by himself personally, but by himself and his agents ; so that if by himself and his agents he exercises due diligence to make the vessel seaworthy, then he is not to be liable for loss or damage resulting afterwards from faults or errors in navigation or in the management of the vessel.

To get himself within the exemption which is in his favor the shipowner must make out that he has by himself or his agents exercised the due diligence which is required. In this case he cannot do so, because his agent in that behalf, as I understand the carpenter to be, has omitted to do that which a reasonably diligent man would do, and has let the ship go to sea with a porthole partially open, and with cargo stowed against it, so that it could not be got at without much labor and loss of time. It seems to me, therefore, that the defend-

ants in this case have not brought themselves within the provision which would be an answer to this action.

It is not necessary to decide what is the interpretation of the expression "faults or errors in navigation or in the management of the vessel." I may say, however, that I think that the meaning of the section is that, if the shipowner by himself or his agents uses due diligence to make the ship seaworthy when she starts, he shall not be liable for what happens afterwards when the ship is at sea and he has no more control over her.

We have been pressed with the case *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association*; but the sole point decided in that case was whether or not, upon a policy of insurance covering goods against losses which were incurred by the improper navigation of the ship carrying the goods, the fact of the ship sailing with a porthole partially closed was improper navigation of the ship. My brother Wills and myself held that it was, and our view was upheld by the Court of Appeal; but that decision has no application to this case, and for these reasons I think the defence fails.

Appeal dismissed.